

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 3182 of 2005

For Approval and Signature:

HON'BLE MR.JUSTICE D.A.MEHTA
and
HON'BLE MS.JUSTICE H.N.DEVANI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
 5. Whether it is to be circulated to the concerned Magistrate/Magistrates, Judge/Judges, Tribunal/Tribunals? : NO

GUJARAT AMBUJA EXPORTS LTD.

Versus

UNION OF INDIA

Appearance:

1. Special Civil Application No. 3182 of 2005
MR PARESH M DAVE for Petitioner No. 1-2
MR JITENDRA MALKAN for Respondent No. 1
NOTICE SERVED BY DS for Respondent No. 2-4
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CORAM : HON'BLE MR.JUSTICE D.A.MEHTA
and
HON'BLE MS.JUSTICE H.N.DEVANI

Date of decision: 03/05/2005

CAV JUDGEMENT

(Per : HON'BLE MS.JUSTICE H.N.DEVANI)

1. By this petition under Article 226 of the Constitution of India, the petitioners seek the following substantial reliefs:

"[A] That Your Lordships may be pleased to issue a Writ of Certiorari or any other appropriate writ, direction or order, quashing and setting aside Final Order No.A-847/WZB/2004/C-III dated 17-8-2004 (Annexure-"K") thereby directing the CESTAT, the second respondent herein, to hear Appeal No.C/906/99 on merits and render a decision on this appeal on merits of the claim of the petitioner company;

[B] That Your Lordships may be pleased to issue a Writ of Mandamus or a Writ in the nature of Mandamus or any other appropriate writ, direction or order, holding and declaring that letter/s dated 29-9-1998 and/or 5-1-1999 were appealable order and the appeal before the CESTAT, the second respondent herein, was maintainable against these letter/s, or in the alternative, Your Lordships may be pleased to issue a Writ of Mandamus or a Writ in the nature of Mandamus or any other appropriate writ, direction or order, quashing and setting aside letters dated 29-9-1998 (Annexure "D") and 5-1-1999 (Annexure "F") thereby directing the Commissioner of Customs (Gujarat), the third respondent herein, to pass an appropriate order on the petitioners' claim for conversion of free shipping bills into drawback shipping bills in accordance with law."

2. The facts of the case as stated in the petition are that the petitioner No.1 is a public limited company engaged in the business of exporting various edible items, including wheat flour (maida). As Maida was not an excisable item, the petitioner company had not undertaken the AR4 procedure and had exported the goods as merchant exporter. The maida was packed in single white Polypropylene (P.P.) bags, which were purchased by the petitioner company from the manufacturer after payment of duty. Thus, maida, the export item was packed in P.P. bags that had borne excise duty. The said goods were exported from Jamnagar under free shipping bills.

2.1 It is the case of the petitioners that since the petitioner company had paid duty on the packing materials, the petitioner company was entitled to get the benefit of Drawback for the said exports in accordance with the rates fixed by the Government of India under the Drawback Schedule. That, the petitioners were informed that drawback shipping bills were required to be filed if export was made under claim of drawback, and the Customs Department would not allow drawback if the export had been made under free shipping bills. It is the case of the petitioners that various circulars and public notices have been issued by the Government from time to time, permitting conversion of a free shipping bill into a drawback bill and also laying down the procedure to be followed in such a case.

2.2 In the backdrop of the aforesaid facts, the petitioners made a representation/application before the respondent No.3, Commissioner of Customs (Gujarat), requesting him to allow conversion of free shipping bills into drawback shipping bills. Pursuant to the aforesaid representation, the petitioners were advised to approach the Ministry of Finance for relaxation of Rule 11 of the Customs and Central Excise Duties Drawback Rules, 1971/Rule 12 of the Customs and Central Excise Duties Drawback Rules, 1995 (the Drawback Rules). Accordingly the petitioners made a further representation to the Director of Drawback on 24.10.1997. Thereafter exchange of correspondence took place and by a letter dated 29.9.1998, the respondent No.4 Assistant Commissioner of Customs (Technical), informed the petitioners that the 3rd Respondent had rejected their request for conversion of free shipping bills to drawback shipping bills.

2.3 Upon receipt of the aforesaid letter, the petitioner company made a further representation to the 3rd respondent by a letter-dated 3.11.1998. Pursuant to the said representation, the Deputy Commissioner of Customs, Ahmedabad, by a letter dated 5.1.1999 informed the petitioner company that as it was not possible to correlate the bags purchased on payment of duty and those used for export, the conversion of dutiable shipping bills to drawback shipping bills was not allowed.

2.4 The petitioner company challenged the aforesaid decision of the Commissioner of Customs, by way of a Revision Application before the Joint Secretary, Government of India. However, the said application was rejected on 26.5.1999, on the ground that the matter did not fall under the first proviso to subsection (1) of

Section 129A of the Customs Act, 1962 (the Act) hence, the application was not maintainable before the Government of India.

2.5 In the circumstances, the petitioner company preferred an appeal before the Customs, Excise and Gold (Control) Appellate Tribunal, (Tribunal) against the letters dated 29.9.1998 and 5.1.1999. An application for condonation of delay was also filed along with the said appeal.

2.6 The Tribunal by an order dated 10.4.2000 held that the communication dated 5.1.1999 was an appealable order. Dealing with the question regarding the jurisdiction of the Tribunal to decide the appeal, the Tribunal held that the decision under challenge had been made by the Commissioner of Customs as an Adjudicating Authority, therefore, an appeal may lie to the Tribunal. The Tribunal also observed that the case of the petitioner company appears to be a very strong one. However, the Tribunal was not satisfied as regards the reasons for the delay caused in preferring the appeal, and dismissed the appeal on that count.

2.7 The petitioners challenged the aforesaid order of the Tribunal by way of a writ petition before this Court, being Special Civil Application No.8696 of 2000. The Court by an order dated 4.9.2000 allowed the petition and directed the Tribunal to hear the appeal on merits.

2.8 Pursuant to the aforesaid order of the High Court, the Customs, Excise and Service Tax Appellate Tribunal (the Tribunal) heard the matter and by its impugned order dated 17.8.2004, dismissed the appeal, holding that the appeal was not maintainable. It is this order of the Tribunal which is subject matter of challenge in the present petition.

3. Mr. Paresh Dave, learned Counsel for the petitioners submitted that the letter in question was undoubtedly an order of the Commissioner against which an appeal would lie before the Tribunal, hence, the Tribunal has committed a jurisdictional error in holding that the appeal in the present case was not maintainable before the Tribunal.

3.1 The learned Counsel argued that while deciding the petitioners' application for condonation of delay, the Tribunal had in terms held that an appeal was maintainable against the letter dated 5.1.1999, as by way of the said letter the decision of the Commissioner had

been communicated by the Assistant Commissioner. It was contended that, in view of the specific finding of the Tribunal in the earlier proceedings, it was not open to the Tribunal to hold that the said communication was not an appealable order. The learned Counsel further urged that once the High Court had directed the Tribunal to hear the appeal on merits, the Tribunal ought not to have refused to entertain the appeal on the ground that the same was not maintainable. Alternatively, it was argued that if the letters in question were not considered to be appealable orders, the petitioners would have no remedy for agitating their grievance, except by way of a writ petition before this Court under Article 226 of the Constitution of India, in which case, this Court may decide the issue in question.

4. Mr. Jitendra Malkan, learned Counsel appearing on behalf of the respondents, supported the impugned order and submitted that the letter dated 5.1.1999 was not an appealable order and as such the Tribunal was justified in dismissing the appeal on the ground that the same was not maintainable. Mr. Malkan also relied upon the affidavit in reply filed by the Assistant Commissioner of Customs, D.O., Jamnagar, wherein it was stated that the letters dated 29.9.1998 and 5.1.1998 were not decisions or orders passed by the Commissioner of Customs as an adjudicating authority, hence, the case does not fall under any of the provisions made under section 129-A of the Act, and that, the Tribunal had rightly dismissed the appeal by holding that the same was not maintainable against a letter (executive instructions).

5. In the light of the view that the Court is inclined to take in the matter, it would not be necessary to examine the merits of the case, namely whether or not the petitioners are entitled to conversion of its free shipping bills into Drawback Shipping Bills.

6. As can be seen, the petitioner company had challenged the letters dated 29.9.1998 and 5.1.1999 before the Tribunal by way of an appeal being Appeal No.C/906-R/99-MUM. The Tribunal by its order dated 10.4.2000 dismissed the appeal on the ground of delay. Before the Tribunal, the case of the Department as recorded in paragraph 5 of the order was that the order passed on 29.9.1998 was the appealable order and not the letter dated 5.1.1999. The Tribunal had after considering all aspects, in paragraph 6 of its order observed that the communications dated 29.9.1998 and 5.1.1999 had not been signed by the Commissioner but

there was enough material to show that the Commissioner had directed the position by him to the addressee of those letters. The Tribunal, referred to various cases decided by Tribunal and stated as follows:

"From this, we have to hold that the communication dated 5.1.1999 is an appealable order. We are not stating that the letter dated 29.9.1998 was an order from which the applicant could have filed an appeal. It is because it is not addressed to the applicant even though copy of the same was marked to the applicant. It was a communication of one Asstt. Commissioner to another Asstt. Commissioner. We cannot agree with the argument made by the ld. Departmental representative that the letter dated 29.9.98 should be treated as an order from which the appeal could have been filed."

6.1 As regards the jurisdiction to dispose of the matter, in paragraph 7 of the order the Tribunal observed as follows:

"7. As far as the jurisdiction of the Tribunal to dispose of the matter is concerned, it is to be mentioned that in terms of section 129A of the Customs Act, it would be clear that any person aggrieved by any of the orders or decision passed by the Commissioner of Customs as an Adjudicating Authority can file an appeal to the Tribunal. It is a different case if a decision or order is passed by the Commissioner (Appeals) as provided under clause (b) of section 129A. The proviso to sub-clause (1) of Section 129A is applicable only in respect of the decision passed by the Commissioner (Appeals). But, in the instant case, the decision had been made by the Commissioner of Customs as an Adjudicating Authority. Therefore, appeal may lie to the Tribunal."

6.2 In paragraphs 9 and 10 of the order, the Tribunal held as follows:

"9. We have considered the entire aspects of the case. It is not as if the entire material was not before the lower authority viz. certificate given by the Range Supdt. regarding payment of duty in respect of HDPE bags which have been used for packing the exported material viz. maida. The case appears to be a very strong but yet in a

case of such a strong nature and the amount involved is of Rs.12 lakhs, the application for condonation of delay does not mention anything about the reason for delay, in our considered view, we cannot accede to the request for excusing the delay..... We, therefore are of the considered view that the delay in filing the appeal cannot be condoned and hence dismiss the same.

10. In view of the dismissal of the COD application, the appeal also stands dismissed."

6.3 The petitioners challenged the aforesaid order dated 14.2.2000 by way of a writ petition before this Court being Special Civil Application No.8696 of 2000. By a judgement and order dated 4.9.2000, the Court was pleased to allow the said petition in the following terms:

"6. It is true that the petitioner ought to have approached the Tribunal within a reasonable period after the revision application was dismissed. However, in view of the fact that the Tribunal itself found at that stage that it is a strong case, the Tribunal if examines the matter on merits, ends of justice will be served. But at the same time, the petitioner is inclined to pay the costs to the Revenue. Considering the facts and the circumstances of the case, Mr. Shah submitted that if heavy costs is awarded, the ends of justice would be met with. We therefore direct that a sum of Rs.15,000/- by way of costs be deposited within a period of 3 weeks and on production of the receipt thereof, the Tribunal shall hear the appeal on merits. The petition is accordingly allowed and Rule is made absolute."

6.4 Pursuant to the aforesaid order of this Court, the Tribunal on 17.8.2004 heard the matter and by the impugned order dated 17.8.2004, dismissed the appeal as not maintainable. The order of the Tribunal reads as under:

"1. When the matter was called, a preliminary objection was raised by the Ld. D.R. as regards the maintainability of this appeal, as it has been filed against an order of letter dated 29.9.1998 addressed to the appellants by the Assistant Commissioner, Technical Head quarters

Ahmedabad conveying the decision of the Commissioner of Central Customs Gujarat having rejected the report regarding conversion of free Shipping Bills to drawback Shipping Bills.

2. It is well settled that this Tribunal can entertain appeals against an order or decision passed by a Commissioner an adjudicating authority. Appeals against such letters by Assistant Commissioner, considering a decision of the Commissioner are not appealable order against which appeal can be maintained.

3. Consequently the appeal is decided as not maintainable."

6.5 Upon perusal of the aforesaid order, it is apparent that the Tribunal has totally ignored the order dated 4.9.2000 of this Court as well as the Tribunal's earlier order dated 10.4.2000. As can be seen, the Tribunal in its order dated 10.4.2000 has specifically held that the communication dated 5.1.1999 is an appealable order. In fact in the earlier round before the Tribunal it was the case of the department as recorded in paragraph 5 of the said order, that the order passed on 29.9.1998 was the appealable order and not the letter dated 5.1.1999. Dealing with the said contention, the Tribunal had stated that it could not agree with the argument made by the Ld. departmental representative that the letter dated 29.9.1998 should be treated as an order from which the appeal could have been filed. Thus, it was in the context of the aforesaid contentions raised by the learned departmental representative, that the Tribunal had given the aforesaid findings.

6.6 It is evident that in a complete turn around, the departmental representative has taken an absolutely contrary stand to the one taken in the earlier round of proceedings before the Tribunal. Previously the stand of the department was that the letter dated 29.9.1998 was an appealable order and that the letter dated 5.1.1999 was not an appealable order. Whereas, in the subsequent proceedings the stand adopted was that the letter dated 29.9.1998 was not an appealable order. Surprisingly, the letter dated 5.1.1999 which was also subject matter of challenge in the appeal and which the Tribunal in its order dated 10.4.2000 had held to be an appealable order, does not merit even a reference in the impugned order of the Tribunal.

6.7 In view of the earlier order of the Tribunal, it

is clear that it would be the challenge to the decision conveyed by the letter dated 5.1.1999 which would have to be decided on merits. It appears that the Tribunal has without application of mind and without any reference to the previous orders of this Court as well as of the Tribunal, made a short shrift of the matter and dismissed the appeal on the ground that the same was not maintainable. In fact the impugned order of the Tribunal refers only to the letter dated 29.9.1998, which the Tribunal had in its order dated 10.4.2000 held to be not appealable, whereas the letter dated 5.1.1999, which was also subject matter of challenge, and which was held by the Tribunal to be an appealable order does not even find a mention in the impugned order. Thus, the Tribunal does not appear to have even applied its mind to the controversy before it.

6.8 It may also be noted that the Tribunal in its order dated 4.10.2000 had specifically held that the letter dated 5.1.1999 was an appealable order. The department has not challenged the said finding of the Tribunal, which has attained finality, hence, it was not open for the Tribunal in subsequent proceedings to ignore the said finding and take a contrary view holding that the appeal was not maintainable.

6.9 As can be seen, the High Court had held that in view of the fact that the Tribunal had itself found that the case was a strong one; the ends of justice would be served if the Tribunal examines the matter on merits. Before the High Court it was the learned Counsel for the department who had submitted that if heavy costs are awarded, the ends of justice would be met with. Accordingly, the Court had directed the petitioner company to deposit a sum of Rs.15,000/- by way of costs and directed the Tribunal to hear the appeal on merits.

6.10 The Tribunal, it appears, has completely ignored the order of the High Court directing it to decide the matter on merits. The departmental representative has also not bothered to check the stand taken on behalf of the department before the High Court. Once the matter was remitted to the Tribunal to hear the same on merits upon payment of costs as suggested by the Counsel appearing on behalf of the department, it was not open to the department to take a contrary stand and contend that the appeal was not maintainable.

7. In the result the petition is allowed. The impugned Final Order No.A-847/WZB/2004/C-III dated 17.8.2002 passed by the Customs, Excise and Service Tax

Appellate Tribunal is hereby quashed and set aside. Appeal No.C/906/99 is restored to the file of the Tribunal. The Tribunal shall hear and decide the appeal on merits in the light of the aforesaid observations.

8. Rule is made absolute accordingly. There shall be no order as to costs.

[D.A.MEHTA, J.]

[H.N.DEVANI, J.]

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